U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 0 8 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to provide IT services and products. It seeks to employ the beneficiary permanently in the United States as a software engineer. The petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).

As set forth in the director's April 5, 2008 denial, the primary issue in this case is whether the beneficiary's three-year bachelor of commerce degree from India is equivalent to a four-year U.S. bachelor's degree. The AAO will also consider whether the job offered requires a member of the professions; whether the beneficiary possesses the major field of study required by the labor certification; and whether the petitioner has demonstrated the ability to pay the proffered wage from the priority date.[1]

On appeal, the petitioner asserts that the beneficiary's three-year bachelor of commerce degree from India is equivalent to a four-year U.S. bachelor's degree. The petitioner claims that the U.S. bachelor's degree requires the student to spend 1800 classroom contact hours to obtaining the degree, while the Indian three year bachelor of commerce degree requires the student to obtain "well in excess of the 1800 contact hours."

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1]An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 *F.* Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

[2]The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). Except as explained in footnote 5, *supra*, the record in the instant case provides no reason to preclude consideration of any

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of $18.1 million, and to employ 124 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

The labor certification was filed with the DOL on March 21, 2005.[3] The proffered wage stated on the labor certification is $75,000 per year. On the labor certification, signed by the beneficiary on May 1, 2007, the beneficiary claimed to have worked for the petitioner since April 2007.[4]

Additional evidence in the record of proceeding includes the following:[5]

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of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3]The labor certification submitted with the instant petition was filed by eSymbiosis Solutions International LLC (eSymbiosis). The record contains a Certificate of Merger and an Agreement and Plan of Merger filed with the State of Delaware. The evidence in the record is sufficient to establish that eSymbiosis was merged into the petitioner on January 1, 2006, and that the petitioner assumed all of the company's rights and liabilities. The petitioner therefore established that it qualifies as a successor-in-interest to eSymbiosis for the purposes of this petition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

[4]This petition involves the substitution of a beneficiary on the labor certification. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective June 16, 2007. *See* 72 Fed. Reg. 27904 (to be codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, the requested substitution will be permitted.

[5]The petition was denied on April 5, 2008. The petitioner filed the appeal on May 8, 2008. On November 18, 2008, over six months after the petitioner filed the appeal, the beneficiary submitted additional supporting documents to the director, including: a new brief that asserts different arguments than the petitioner's brief; a bachelor of laws diploma and statement of marks submitted into the record for the first time; and a new academic equivalency evaluation of the beneficiary's bachelor of laws and bachelor of commerce degrees. The beneficiary's arguments and supporting documents will not be considered here. First, the brief and supplemental documents were not timely submitted. When the petitioner submitted the appeal, it did not request additional time to submit additional supporting evidence. The regulation at 8 C.F.R. § 103.3(a)(2)(i) states that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.5a(b). The beneficiary's documents were therefore submitted over six months after the deadline to complete the appeal. Second, the beneficiary of a petition is not a recognized party in this proceeding. *See* 8 C.F.R. § 103.2(a)(3). The beneficiary of a petition is prohibited from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Therefore, any appeal, briefs or supporting documents submitted by the beneficiary will not be considered. Third, this is the first time that evidence of the beneficiary's bachelor of law degree has been submitted, despite the fact that the director's January 14, 2008

- Petitioner's Forms 1120, U.S. Corporation Income Tax Return, for 2004 through 2006.
- Petitioner's unaudited financial statements for 2004 through 2007.
- Forms 1120 for eSymbiosis Solutions International LLC (eSymbiosis), for 2002 through 2005.
- Unaudited financial statements for eSymbiosis for 2005.
- Bachelor of commerce diploma and consolidated marks memorandum from Osmania University, India.
- Advanced diploma for systems management and transcript from NIIT, India.
- Foreign credential evaluation prepared by [redacted] **Chief Evaluator of Marquess** Educational Consultants, and President of European-American University, Commonwealth of Dominica.
- Foreign credential evaluation prepared by Professor Andrew Linley, Vice-President for Development and Quality Assurance of European-American University, Commonwealth of Dominica.
- Letter of [redacted], former Professor of Physics at the University of Mumbai, India, stating that an Indian three year bachelor's degree is equivalent to a U.S. bachelor's degree.
- Letter from the Assistant Registrar of Osmania University, India, listing the courses and classroom contact hours completed by the beneficiary from 1988 to 1991.
- Letter of [redacted], Principal of L. N. Gupta Evening College of Science & Commerce, India, listing the courses and classroom contact hours completed by the beneficiary from 1988 to 1989 and 1990 to 1991.
- Resume of the beneficiary.
- Offer letter stating that the beneficiary was offered employment as a programmer analyst with Technology Consultants Inc. on January 11, 2005.
- Experience letter stating that the beneficiary was employed as a programmer analyst by Dyna Consulting Services, Inc. from September 1, 2004 to December 31, 2004.
- Experience letter stating that the beneficiary was employed as a systems analyst by Anabatic Technologies Asia Pacific from August 7, 2003 to February 11, 2004.
- Experience letter stating that the beneficiary was employed as a solutions specialist by Commerce Exchange Pte Ltd from September 5, 2001 to July 10, 2003.
- Experience letter stating that the beneficiary was employed as a software developer by VertureSoft InfoSystems Pte Ltd from August 2000 to August 2001.
- Experience letter stating that the beneficiary was employed as a programmer/analyst by Satya Infomatics (India) Pvt. Ltd. from October 8, 1997 to June 20, 2000.

Request for Evidence (RFE) questioned the beneficiary's educational credentials. In addition, the beneficiary did not disclose the bachelor of laws degree on Form ETA 750B, Item 11. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's Request for Evidence.

- Experience letter stating that the beneficiary was employed as a software programmer by Ultimate Software Technology from July 1996 until September 1997.
- Form W-2, Wage and Tax Statement, for 2007, issued by the petitioner.
- Forms W-2 for 2005 and 2006, issued by Technology Consultants Inc.
- Form W-2 for 2004, issued by Dyna Consulting Services, Inc.
- Paycheck stubs issued by the petitioner in 2007 and 2008.
- Paycheck stubs issued by Technology Consultants Inc. in 2006 and 2007.
- Letter of [redacted] Chief Financial Officer of the petitioner, stating that the petitioner merged with eSymbiosis on January 1, 2006, and that the petitioner has "over 120 employees."
- Letter of [redacted], Vice President of First National Bank, describing the petitioner's accounts with the bank.
- Chart of the names and salaries of employees who are being sponsored by the petitioner for permanent residence.
- Quarterly wage reports, corporate payroll reports and unemployment insurance reports for 2005 through 2007.

Whether the Position Requires a Member of the Professions Holding an Advanced Degree

The petition seeks to classify the beneficiary as a member of the professions holding an advanced degree. Section 203(b) of the Act states:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

In order to determine whether the beneficiary qualifies for the requested immigrant classification, the AAO will analyze whether the offered position requires an advanced degree professional. It is important to note that the DOL's role in the employment-based immigrant visa process is limited to determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is significant that none of the responsibilities assigned to DOL, nor the remaining regulations implementing these duties at 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or the job offered. Instead, the authority to make

this determination rests solely with U.S. Citizenship and Immigration Services (USCIS). *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

The regulation at 8 C.F.R. § 204.5(k)(4) states that, in order to establish that the offered position qualifies for the requested immigrant classification, "[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent." If the job itself does not require an advanced degree professional, the petition must be denied.

The regulation at 8 C.F.R. § 204.5(k)(2), defines "advanced degree" as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The same regulation defines "profession" as:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Id. Section 101(a)(32) of the Act states that "[the term 'profession'] shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The key to determining whether the offered position of software engineer requires a professional holding an advanced degree is found on the labor certification at Form ETA 750A, Item 14. *See* 8 C.F.R. § 204.5(k)(4). This section of the labor certification describes the minimum education, training and experience required to perform the duties of the job offered. In the instant case, the labor certification states that the software engineer position requires:

EDUCATION
Grade School: 8
High School: 4
College: 6
College Degree Required: master's degree or a bachelor's degree plus five years of experience.

Major Field of Study: a quantitative discipline [as defined in an attachment to the labor certification].

EXPERIENCE

Job Offered: Five years.
Related Occupation: Five years as a programmer analyst or systems analyst.

Since the labor certification requires an individual with a master's degree or a bachelor's degree followed by five years of experience in the specialty, the position requires an individual with an advanced degree.[6]

The next issue is whether the offered position also requires a member of the professions. A software engineer is not one of the occupations listed at Section 101(a)(32) of the Act. Therefore, this analysis is based on whether a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. *See* 8 C.F.R. § 204.5(k)(2).

As is stated above, Form ETA 750A, Item 14 of the labor certification states that the position requires a master's degree (or bachelor's degree and five years of experience) in a "quantitative discipline." An addendum to the labor certification defines the term "quantitative discipline." The addendum states that "the degree's actual name is not significant as long as it has a significant core of necessary related courses." The addendum lists twenty possible qualifying degrees, including accounting, biology, commerce, computer science, economics, finance and physics. The addendum states that the permissible "quantitative discipline" degrees for the offered position are not limited to those on the list. In short, the labor certification states that a broad array of degrees are acceptable as long as the individual completed "a significant core of necessary related courses" to the occupation of software engineer.

Although the definition of "professional" at 8 C.F.R. § 204.5(k)(2) does not state that the required degree must relate to the specialty, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, USCIS is justified in

[6]The fact that the labor certification does not explicitly state that the five years of experience in addition to the bachelor's degree must be "progressive" does not disqualify the offered position from meeting the definition of "advanced degree." On the labor certification, the DOL assigned the offered position the Standard Occupational Classification code 15-1031, Computer Software Engineers, Applications. According to the DOL's Occupational Outlook Handbook (OOH), computer software engineers "must continually strive to acquire new skills if they wish to remain in this dynamic field." www.bls.gov/oco/ocos267.htm (accessed June 16, 2009). This information, in conjunction with the description of the duties and requirements of the position set forth on Form ETA 750A of the labor certification, is sufficient to find that the petitioner has established that the required experience involves advancing levels of responsibility and knowledge in the specialty, and is therefore "progressive."

considering whether the alien can truly be considered a member of the profession associated with the occupation certified by DOL. It is further noted that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah,* 17 I&N Dec. 244, 246 (Reg. Comm. 1977).

According to the OOH, "[t]he usual college major for applications software engineers is computer science or software engineering."[7] The OOH also states "academic programs in software engineering may offer the program as a degree option or in conjunction with computer science degrees." *Id.*

On appeal, the petitioner did not provide any evidence that a software engineer position does not normally require a bachelor's degree in a computer related field. Such evidence might have included job advertisements for this position by independent employers listing the job requirements as a bachelor's degree in any field. Thus, the petitioner has not established that entry into the computer software engineer profession is open to anyone holding a baccalaureate degree in a "quantitative discipline," which is defined in the labor certification as encompassing a broad array of fields.

We emphasize that we do not question the DOL's certification of the labor certification. The DOL's certification, however, does not bind USCIS in determining eligibility for a specific immigrant classification. *Madany,* 696 F. 2d. at 1012-13; *Tongatapu Woodcraft Hawaii, Ltd.,* 736 F. 2d at 1309. To hold otherwise would undermine congressional intent. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements in determining whether a specific job is a profession, then any alien with a bachelor's degree could be brought into the United States under section 203(b)(2) of the Act to perform non-professional employment. *See generally Defensor v. Meissner,* 201 F. 3d 384, 388 (5th Cir. 2000) (only considering the employer's requirements would lead to absurd results).

In light of the above, given the facts of this case and the petitioner's failure to demonstrate that the normal requirement for entry into the computer software engineering profession is a baccalaureate in any "quantitative discipline" as broadly defined in the submitted labor certification, including a completely unrelated concentration, we conclude that the job certified by the DOL does not require a member of the computer software engineering profession or any other profession. The petition may not be approved for this reason.

Whether the Beneficiary is a Member of the Professions Holding an Advanced Degree and Meets the Requirements of the Offered Position

The petitioner must also establish that the beneficiary is a member of the professions holding an advanced degree, and that he meets the requirements of the offered position as set forth in the labor certification.

Since the beneficiary does not possess a master's degree, in order to qualify as a member of the professions holding an advanced degree, the beneficiary must possess a single degree equivalent to a

[7]www.bls.gov/oco/ocos267.htm (accessed June 16, 2009).

U.S. bachelor's degree in addition to five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree."

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree and did not allow for the substitution of experience for education. In response, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree. 56 Fed. Reg. 60897,60900 (Nov. 29,1991).

As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900. *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

In summary, there is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(3)(i)(B).

The beneficiary possesses a three-year bachelor of commerce degree from Osmania University, India. The issue is whether the three-year degree is equivalent to U.S. baccalaureate degree, despite the fact that a United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244.

The petitioner asserts that the beneficiary's three-year bachelor of commerce degree from India is equivalent to a four-year U.S. bachelor's degree. The petitioner claims that the U.S. bachelor's degree requires the student to spend 1800 classroom contact hours to obtain a degree, while the Indian degree requires the student to spend "well in excess of the 1800 contact hours" to obtain a degree. The petitioner's appeal lists several three year bachelor's degree programs in the U.S. The petitioner also claims that several U.S. universities provide accelerated programs that permit students to complete their bachelor's degree within three years (or less, when prior learning is taken into account). The petitioner claims that "it is the academic content, not the duration of the program that should count."

The record contains a foreign credential evaluation prepared by [redacted] Chief Evaluator of Marquess Educational Consultants (Marquess evaluation), and President of European-American University,[8] Commonwealth of Dominica; a foreign credential evaluation prepared by Professor Andrew Linley, Vice-President for Development and Quality Assurance of European-American University, Commonwealth of Dominica; and a letter of [redacted], former Professor of Physics at the University of Mumbai, India, stating that an Indian three year bachelor's degree is equivalent to a U.S. bachelor's degree.

All three evaluations state the same conclusion: that the beneficiary's three-year bachelor of commerce degree is equivalent to a four-year U.S. bachelor's degree because the Indian degree requires more classroom contact hours than the U.S. bachelor's degree.

A substantial portion of the Marquess evaluation consists of an excerpt of an article titled "Brief History of the American Academic Credit System: A Recipe for Incoherence in Student Learning," by [redacted] Samford University, September 2002. The article discusses evolution and

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[8]According to its website, European-American University provides distance learning degrees and awards degrees based on experience. www.thedegree.org/apel.html (accessed July 8, 2009). The website explains the institution's accreditation as follows:

> The University holds official accreditation via a Parliamentary Charter dated 29 July 2008 from the International States Parliament for Safety and Peace, an intergovernmental association of nations founded in 1975 by Makarios III, then President of the Republic of Cyprus, and Archbishop Viktor Busà, with the constitutional support of the Republics of Mali and Senegal. The ISPSP is officially recognized by decree of the Republic of Ecuador and its International Vice-Presidents are Teodoro Obiang Nbasogo, President of Equatorial Guinea, and Hugo Chavez, President of Venezuela. The General Secretary until December 2008 was the late Lansana Conté, President of Guinea, and the Grand Chancellor International until June 2009 was the late Omar Bongo Ondimba, President of Gabon. The ISPSP is under Royal Protection of HRH Prince Saqer Bin Khalid Al-Qassimi of the Royal House of Sharjah, United Arab Emirates, is supported by the King of Cambodia and is recognized by nations around the world.

shortcomings of the U.S. credit hour system, and examines the arbitrariness of the credit hour as a purported unit of learning. It is noted that the article's criticism of the semester credit hour is equally applicable to the classroom contact hour. Accordingly, the article undermines the Marquess evaluation, as the evaluation seeks to replace the semester credit hour with the classroom contact hour as the appropriate metric for determining equivalency.[9]

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[9]The Marquess evaluation also cites to and attaches: findings from the CGS International Graduate Admissions Survey, Phase III: Admissions and Enrollment, October 2006. The survey discusses international enrollment and what countries students mainly come from to study in the United States, as well as the issue of three-year degrees. The survey states that three-year degrees have become less controversial in terms of student graduate admissions of those with three-year degrees, however, acceptance of such degrees is not universal; The Lisbon Convention related to the Recognition of Qualifications concerning Higher Education in the European Region, dated April 11, 1997. The Lisbon Convention discusses recognition of qualifications issued by other parties to meet the general requirements for access to higher education, "unless a substantial difference can be shown between the general requirements for access in the Party in which the qualification was obtained and in the Party in which recognition of the qualification is sought;" the European Centre for Higher Education, Recommendation on Criteria and Procedures for the Assessment of Foreign Qualifications, dated June 6, 2001, which discusses the need for ability to establish the authenticity of documents, assessment of credentials in terms of academic equivalency, and an outline for procedures to assess foreign qualifications; The European Centre for Higher Education, Guidelines for the Mutual Recognition of Qualifications between Europe and the United States of America, dated 1995, which discusses U.S. evaluation of European degrees. The report notes that European degrees include more specialized studies early on, while the U.S. education system emphasizes broader studies and greater specialization in the later stages; the World Education News & Reviews ("WES"), "Evaluating the Bologna Degree in the U.S.," dated March/April 2004. The article includes an assessment of the Bologna Process and terms "the new European bachelor's" degree based on three years as "quite distinct from its U.S. counterpart;" a report from the American Educational Research Association, Re-engineering Four Years of College into Three: The Makings of a Competency-based Three Year Bachelor's Degree, Annual Meeting 1998. The report discusses the potential development of a three-year, six semester, 120-credit bachelor's degree program in business administration available to a select group of qualified students; Findings from the 2005 CGS International Graduate Admission Survey III: Admissions and Enrollment, revised and dated November 2005. The CGS report relates to a "multi-year examination of international graduate admissions trends," and considers the number of students who applied, were accepted, where they were from, their field of study, as well as issues related to three-year degrees; materials from the Council of Graduate Students Annual Conference, Palm Springs, regarding "U.S. Recognition of International Qualifications: An Australian Perspective, When is Three Years as Good as Four?" dated December 8, 2005. The report recognizes the "lack of international framework for quality assurance and recognition of qualifications." The report notes that some U.S. graduate schools do not recognize three-year Australian or EU degrees; an article by Jeannine E. Bell and Robert A. Watkins on "Strategies in Dealing with the Bologna Process," from the International Educator, dated September and October 2006.

The petitioner failed to provide peer-reviewed material confirming that assigning credits by contact hour is applicable to the Indian tertiary education system. For example, if the ratio of classroom and outside study in the Indian system is different than the U.S. system, which presumes two hours of individual study time for each classroom hour, applying the U.S. credit system to Indian classroom hours would be meaningless. [redacted] The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise", available at http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf (accessed June 25, 2009), provides that the Indian system is not based on credits, but is exam based. *Id.* at 11. Thus, transfer credits from India are derived from a multiple of the number of exams passed by the student, not by contact hours. *Id.* For example, in India, six exams at year's end multiplied by five equals the equivalent of 30 credit hours. *Id.*

Dr. Kersey also relies on a UNESCO document. The relevant language relates to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

> "Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

It is noted that all the attached materials describe theoretical arguments for accepting three-year degrees, that there is a dispute within the academic community related to acceptance of three-year degrees for graduate admission, and that in the future with increasing numbers of international students, the U.S. may need to accept or address the three-year degree issue. However, no study or report conclusively states that all three-year degrees should be accepted. Further, acceptance of the Bologna degree system in Europe is different from acceptance of three-year Indian or Australian degrees. If the three-year Indian bachelor's degree were truly a foreign equivalent degree to a U.S. bachelor's degree, the vast majority of U.S. institutions would accept these degrees for graduate admission without provision.

In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004) (accessed on July 8, 2009 at http://unesdoc.unesco.org/images/0013/001388/138853E.pdf), provides:

> Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. UGC, AICTE and AIU are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.)

It is also noted that there exists accelerated degree programs in the United States. However, this fact provides no useful information about the program attended by the beneficiary in India. Moreover, one individual's experience in combining advanced placement courses and an accelerated course load does not suggest the beneficiary's experience was comparable. The existence of accelerated programs in the United States is not useful in evaluating unrelated foreign degrees. At issue is not whether it is possible to obtain a baccalaureate in less than four years in an accelerated program in the United States or elsewhere, but the actual equivalence of the specific degree the beneficiary obtained. The beneficiary did not compress his studies to obtain a degree in less than four years from an institution that grants four-year degrees. Rather, he completed the regular program of study for a three-year degree program. Thus, at issue is the equivalence of the three-year program he actually completed.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *Id.* Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Given the above-mentioned issues with the submitted credentials evaluations, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). EDGE provides another source to consider in the evaluation of foreign credential equivalencies. AACRAO, according to its website at www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials."[10]

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[11] If placement recommendations are included the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

The record contains evidence that the beneficiary obtained a bachelor of commerce degree. EDGE provides that a bachelor of commerce degree awarded in India represents the attainment of a level of education comparable to two years or three years of university study in the United States.[12]

The AAO has also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). The 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. *Id.* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual.

One of the PIER publications reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at I80 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing

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[10]http://aacraoedge.aacrao.org/register/index/php (accessed July 8, 2009).

[11]*See An Author's Guide to Creating AACRAO International Publications*, 5-6 (First ed. 2005), at www.aacrao.org/publications/guide_to_creating_international_publications.pdf (accessed July 8, 2009).

[12]http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128 (accessed June 25, 2009).

up to three years (0-90 semester credits) to be determined through a course to course analysis." This information undermines the evaluations submitted, which attempt to assign credits hours for the beneficiary's three-year baccalaureate that are close to or beyond the 120 credits typically required for a U.S. baccalaureate.

Accordingly, it is concluded that the beneficiary's three-year bachelor of commerce degree from Osmania University is not equivalent to a U.S. bachelor's degree.

Finally, even if the beneficiary's three-year bachelor of commerce degree were equivalent to a U.S. bachelor's degree, the degree still does not meet the educational requirements of the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. at 159; *see also Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, Form ETA 750A, Item 14, states that the position requires a degree in a "quantitative discipline." The addendum to the labor certification states that "the degree's actual name is not significant as long as it has a significant core of necessary related courses." A review of the transcript for beneficiary's bachelor of commerce degree indicates that the beneficiary did not take courses related to software engineering. Accordingly, the beneficiary does not meet the educational requirements of the labor certification. Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the offered position.

In summary, the petitioner has not established that the beneficiary is a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2). In addition, the petitioner has not established that the beneficiary satisfies the requirements of the labor certification. The petition may also not be approved for these reasons.

The Petitioner's Ability to Pay the Proffered Wage

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, the labor certification was filed with the DOL on March 21, 2005. The proffered wage stated on the labor certification is $75,000 per year.

The evidence in the record establishes that it is more likely than not that the petitioner has the ability to pay the proffered wage from 2006 until the present. However, the petitioner is a successor-in-interest to eSymbiosis, the company that filed the labor certification with the DOL. eSymbiosis was merged into the petitioner on January 1, 2006. Accordingly, the petitioner must also establish the financial ability of the predecessor enterprise to have paid the proffered wage starting from the priority date until the date of the merger. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481. The analysis below pertains to the issue of whether or not eSymbiosis had the ability to pay the proffered wage from the priority date on March 21, 2005 until the merger with the petitioner on January 1, 2006.

In determining eSymbiosis's ability to pay the proffered wage in 2005, USCIS will first examine whether it employed and paid the beneficiary during the required period. If the documentary evidence established that eSymbiosis employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of its ability to pay. If eSymbiosis did not paid the beneficiary wages at least equal to the proffered wage for the required period, it is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

If, as in this case, it has not been established that eSymbiosis employed and paid the beneficiary an amount at least equal to the proffered wage during the required period, USCIS will next examine the net income figure reflected on the federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill.

1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on gross sales and wage expense is misplaced. Showing that gross sales exceeded the proffered wage is insufficient. Similarly, showing that the employer paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The 2005 tax return of eSymbiosis states the company had net income of -$267,995.00.[13] Therefore, for 2005, eSymbiosis did not have sufficient net income to pay the proffered wage.

If eSymbiosis's net income does not equal the amount of the proffered wage or more, USCIS will review its assets. Total assets are not considered in the determination of the ability to pay the proffered wage. Total assets include depreciable assets that a company uses in its business. Those

[13]For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, total assets must be balanced by its liabilities. Otherwise, they cannot properly be considered in the determination of ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between current assets and current liabilities.[14] If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, eSymbiosis is expected to be able to pay the proffered wage using those net current assets. eSymbiosis's 2005 tax return states that the company had net current assets of -$307,943.[15] Therefore, eSymbiosis did not have sufficient net current assets to pay the proffered wage.

The petitioner has therefore not established that eSymbiosis had the ability to pay the beneficiary the proffered wage as of the priority date to the date of the merger through an examination of wages paid to the beneficiary, its net income and its net current assets.

The record also contains eSymbiosis's unaudited financial statements for 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look*

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[14]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[15]On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, it is noted that eSymbiosis's 2005 tax return shows gross sales of $8,135,522.00. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that its predecessor, eSymbiosis, had the ability to pay the proffered wage in 2005.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises,* 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.